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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

October Term, 1966

No. 343

PRIMA PAINT CORPORATION,

Petitioner,

v.

FLOOD & CONKLIN MFG. CO.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION OF THE AMERICAN ARBITRATION ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

and

BRIEF OF THE AMERICAN ARBITRATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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MOTION OF THE AMERICAN ARBITRATION ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 42 of the Rules of this Court, the American Arbitration Association, Inc., hereinafter called "AAA," by its Arbitration Law Committee, Whitney North Seymour, Chairman, and four members appointed as a subcommittee, Sol N. Corbin, Osmond K. Fraenkel, William J. Isaacson, and H. H. Nordlinger, hereby respectfully moves for leave to file a brief annexed hereto as *amicus curiae* in this case. The written consent of respondent has been obtained. The consent of the petitioner was requested but refused.

The AAA is a non-profit membership corporation organized in 1926 and existing under the laws of the State of New York. Its purposes are, among others, as stated in its presently effective Certificate of Incorporation:

> "1. To promote the knowledge and spread the use and the remedy of arbitration throughout the United States and other countries. * * *
>
> * * *
>
> "5. To disseminate knowledge of the value of the application of arbitration, mediation and conciliation, of desirable systems thereof, and of their practical operation as methods for the disposition of commercial and industrial disputes.
>
> "6. To cooperate with Bar Associations, International, American, State and Local, in the proper delimitations of the fields of arbitration, mediation and conciliation, and the coordination and the administration of the law, machinery and systems of arbitration, mediation and conciliation."

The AAA maintains twenty-two regional offices which are responsible for the administration of arbitrations conducted pursuant to its Rules throughout all fifty states. The AAA conducts educational seminars on all aspects of arbitration and is today the primary organization concerning itself exclusively with arbitration in this country.

The brief which the AAA seeks to submit is necessitated by the fact that the interest by the business community in the issues involved in this case far transcends the interest of the immediate litigants. The resolution of these issues will have a far-reaching effect upon literally untold thousands of commercial contracts if the decision of the U. S. Court of Appeals for the Second Circuit is reversed.

The AAA is not concerned with the outcome of this case so far as it affects the particular parties. But as a sponsor and leader of the development of commercial arbitration, the AAA is in a unique position to advance the interest of the commercial world in the sound and proper construction of commercial arbitration and agreements to arbitrate.

For the reasons heretofore assigned, and upon the proposed *amicus* brief annexed hereto, the AAA respectfully requests that this motion be granted.

Dated: February 16, 1967.

Respectfully submitted,

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BRIEF OF THE AMERICAN ARBITRATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

Statement of Interest

This brief *amicus curiae* is filed on behalf of the American Arbitration Association, Inc., hereinafter AAA or Association, a non-profit membership corporation organized in 1926 and existing under the laws of the State of New York, and a sponsor and leader in the development of commercial arbitration.

As such, the Association is vitally interested in the determination as to which law, state or federal, will govern the construction, application and effect of arbitration agreements in interstate commerce cases. This decision may vitally affect both the extent and effective use of arbitration in this country. The Association, as well as the commercial world in general, is also vitally interested in the legal significance to be accorded the broad arbitration clause, recommended by the Association and widely used in contracts throughout the United States. Unless the decision of the United States Court of Appeals for the Second Circuit is sustained, the use of commercial arbitration might be seriously curtailed and the obligation of an innumerable number of contracts called into question.

Since the Association has no interest in this case as between the parties thereto, but only in the enunciation of a sound and workable law of arbitration, it takes no position as to whether in the instant case the contract evidences a transaction involving interstate commerce. For purposes of this argument, interstate commerce is assumed.

Questions Presented

Whether the Federal Arbitration Act is applicable to an arbitration provision in a contract evidencing a transaction involving interstate commerce, where the sole basis of jurisdiction in the federal court is diversity of citizenship.

Whether under the Federal Arbitration Act, a claim that the entire contract was fraudulently induced is arbitrable under a broad arbitration clause, whatever the relief sought.

Statutes Involved

Amicus respectfully refers the Court to the statutes involved as enumerated and incorporated in the brief for petitioner.

Statement of the Case

Amicus respectfully refers the Court to the statement of the case contained in the opinion of the United States Court of Appeals for the Second Circuit incorporated in the Transcript of Record.

Summary of Argument

The Federal Arbitration Act, enacted under the commerce clause power of Congress, created a national substantive law governing arbitration agreements in transactions involving interstate commerce. As federal substantive law, it must be applied by a federal court to an arbitration agreement when interstate commerce is involved, even where the sole jurisdictional ground is diversity of citizenship.

Under this federal law, the broad arbitration clause as recommended by the AAA and widely used must be held to evidence an intent by the parties to arbitrate a dispute over fraud in the inducement, where there is no allegation that the arbitration provision was itself fraudulently procured. Since an arbitrator is empowered to grant equitable relief, the remedy sought, in this case, rescission, has no bearing on the outcome.

ARGUMENT

POINT I

The Federal Arbitration Act enacted "substantive" federal law meant to apply to an arbitration agreement contained in a contract evidencing a transaction involving interstate commerce, where jurisdiction exists solely by diversity of citizenship.

The question presented is whether the Federal Arbitration Act is grounded merely on the power of Congress to create procedural law for the federal court system (Article III, Section 1 of the Constitution), or whether it is based on Congressional authority to enact substantive federal law, specifically under the commerce clause, for transactions involving interstate commerce (Article I, Section 8).

One of the traditional methods employed to answer such a question is to ascertain the intent of the framers of the legislation, through an analysis of the legislative history. Yet, probably due to the almost complete lack of opposition to the Bill, there was little Congressional discussion of it.[1]

Despite the dearth of historical analysis, there is clear authority for the proposition that the Federal Arbitration Act was grounded in the Congressional authority to enact substantive law under the commerce clause.

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1. "It is indeed remarkable how so important and far-reaching legislation can emerge from Congress with such a dearth of intelligent discussion." Baum & Pressman, *The Enforcement of Commercial Arbitration Agreements in the Federal Courts*, 8 N.Y.U.L. Rev. 428, 430, f.121 (1931).

Specifically relevant is the statement of the Committee of the Judiciary, from which the bill, as finally enacted, was reported. The Committee noted that:

> "The remedy is founded also upon the Federal control over interstate commerce, and over admiralty. The control over interstate commerce reaches not only the actual physical interstate shipment of goods but also contracts relating to interstate commerce." H.R. Rep. No. 96 (68th Congress, 1st Sess., 1924), p. 1.

The federal control over interstate commerce and admiralty is, of course, substantive. This view, that the Act was founded upon this control, seems to have been relied on by this Court in *Bernhardt* v. *Polygraphic Co. of America*, 350 U. S. 198, 76 S. Ct. 273, 100 L. Ed. 199 (1956).

In *Bernhardt*, the issue was whether Section 3 of the Act, not specifically limited by its terms to interstate commerce, could be applied by a federal court in an intrastate commerce case arising by diversity of citizenship.

This Court held that Section 3 could not be applied, for two reasons. First, because Congress did not have the power, after *Erie R.R.* v. *Tompkins*, 304 U. S. 64 (1938), to create the applicable law for an intrastate commerce case, since a state-created right was indisputably at issue.

The second reason offered by this Court was for present purposes, even more significant. It first noted that Section 3 could not be read independently, but had to be interpreted in the context of the entire Act, particularly Sections 1 and 2. "There is no intimation or suggestion in the Committee Reports that §§1 and 2 cover a narrower field

than §3" (350 U. S. at p. 201). In concluding that the Act as a whole, and therefore §3, was never intended to apply to cases involving intrastate commerce, this Court found persuasive the above quoted language from the House Report on the bill, that "one foundation of the new regulating measure is 'the Federal control over interstate commerce and over admiralty'" (350 U. S. at p. 202).

The Constitutional questions alluded to in Mr. Justice Frankfurter's concurrence exist only if the Act is characterized as procedural. Once it is established that the Act was based rather on Congress' substantive power over interstate commerce, clearly implied in the majority opinion, no such Constitutional impediments remain.

It has been noted, with particular reference to *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, 44 S. Ct. 274, 68 L. Ed. 582 (1924), that at the time the Federal Arbitration Act was passed, arbitration was characterized as relating to remedy.[2] The statement is accurate and undoubtedly this remedial label then attached to arbitration is largely responsible for today's difficulty in characterizing the Arbitration Act. The fact that arbitration was so characterized, however, does not mean that the Act was grounded on a procedural base.

The overriding difficulty implicit in a characterization of the Act as purely procedural is an inability to explain

2. It is not so characterized today. See *Bernhardt* at p. 203:

"For the remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action created by the State. The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an aribtration panel may make a radical difference in ultimate result."

its limitation to interstate commerce and maritime transactions.

> "The Congress, finding it expedient and desirable to require the courts of the United States to repudiate common law revocability and non-enforceability of written arbitration agreements covering controversies arising out of 'maritime transactions' and 'commerce' should, it seems, have found it equally expedient and desirable to accomplish the same objectives with respect to like written arbitration agreements covering other and different controversies over which the courts of the United States take jurisdiction by reason of diversity of citizenship of the parties or otherwise."[3]

The fact that Congress did not find it expedient and desirable to accomplish these same objectives with reference to controversies other than those arising out of "maritime transactions" and "commerce" seems explicable only if Congress considered it either necessary or desirable to limit itself to subject matter within its constitutional legislative authority. Whatever the motivation, Congress clearly intended to bedrock the Act in the commerce power.

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3. Sturges & Murphy, *Some Confusing Matters Relating to Arbitration Under the United States Arbitration Act*, 17 Law & Contemporary Problems 580, 587 (1952).

Note, 69 Yale L. J. 847, 858 (1960). "Finally, if the act is exclusively remedial, Congress probably would not have restricted it to contracts evidencing transactions in maritime and interstate or foreign commerce. Rather, the act would have applied in all actions arising in federal courts. Congress probably limited the scope of Section 2 to maritime and interstate or foreign commerce because they felt this necessary to contain the act within Constitutional bounds—the House Report an the bill stated that federal control over interstate commerce and admiralty was relied upon as well as the power of Congress to regulate the courts. These limitations would be unnecessary if the act were in its nature exclusively remedial."

The best explanation of the nature of the Arbitration Act today is contained in a statement of the Second Circuit in *Metro Industrial Painting Corp.* v. *Terminal Construction Co.*, 287 F.2d 382, 386, cert. denied, 368 U. S. 817 (1961):

> "The report submitted by the committee of the House of Representatives which drew up the law expressly found authority for its enactment in the power over federal-court procedures granted to Congress by Article III, §1 of the Constitution and the substantive powers of Article I, §8 (interstate commerce) and Article III, §2 (admiralty). Since the Act could not stand after the Supreme Court decision in *Bernhardt* v. *Polygraphic Co.*, supra, as an exercise of the power to control procedures in the federal courts, the alternative basis of legislative authority became the sole ground for invoking the Act in diversity cases."

If there is any significance to the fact that the Federal Arbitration Act was patterned after the New York statute, it would tend to support a substantive construction. The New York statute has itself been analyzed as "changing the substantive law of arbitration in New York as well as providing a new remedy."[4]

In the subcommittee hearings of the Judiciary Committee in 1928, Senate Bill 4214, virtually the same bill as the one enacted the following year, was discussed. Mr. Charles Bernheimer, then Chairman of the Arbitration Committee of the New York Chamber of Commerce, at whose request the bill was introduced, testified as follows:

> "This bill follows the lines of the New York arbitration law, applying it to the fields wherein there is

4. See 69 Yale L. J. 848, *supra* note 3, at 854-55, for an analysis of the New York Arbitration Act as changing "the substantive nature of arbitration" law in New York.

> Federal jurisdiction. These fields are in admiralty and in foreign and interstate commerce." Hearing Before Subcommittee of the Judiciary on S.4214 (67th Cong. 4th Sess., 1923), p. 2.

Again there is emphasis placed upon the areas of congressional substantive power.

While it was indicated in *dicta* in *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.*, 271 F.2d 402, 408 (2d Cir. 1959), *cert. granted*, 362 U. S. 909 (1960), *dismissed pursuant to Rule 60*, 364 U. S. 801 (1960), that the Act did not furnish an independent basis of federal jurisdiction, it must also be noted that the purpose in so doing was to further prove the Act's substantive nature. For, as was noted, if the Act were merely procedural, it obviously would not have furnished an independent basis of federal jurisdiction. The fact that the draftsmen took such pains within the Act to so stipulate further supports the conclusion that more than mere procedural regulation was intended. Section 14 of the Act itself reinforces this conclusion. If only a rule of procedure in the federal courts were at issue, there would have been no reason to deny the Act retroactive effect. Instead the Act specifically provided that it was inapplicable to contracts made prior to January 1, 1926.

It is true that there is no intent expressed in the Act that it be directly applicable to state court actions. But, considering the year in which the Act was passed, no inference can be drawn that it was thus not intended to be substantive.

> "The enactment occurred during the era of *Swift* v. *Tyson*, when even with respect to underlying rules of

decision in the commercial field, divergence between state and federal law was not uncommon." Note, 73 Harv. L. Rev. 1382, 1383 (1960).

It should also be noted, that even if a characterization of the Act as purely procedural were correct, Congress nevertheless intended that it apply in interstate commerce cases arising in federal court under diversity of citizenship. For at the time, pre-*Erie* and pre-*Bernhardt*, the appropriate procedural law to be applied was the law of the forum. Despite the fact that the state law which otherwise would have governed the transaction might be one of common-law revocability, the federal forum would apply the federal rule of irrevocability as expressed in the Act. To rule today that in the identical circumstances a state common law rule of revocability would control would necessarily thwart the precise result the Act was intended to accomplish. In 1925, when the law was enacted, only two states enforced agreements to arbitrate future disputes. To suggest that Congress would fashion a modern federal law of enforceability which would in turn enforce "state-created rights" of non-enforceability in forty-six states would be absurd.[5]

While, as has been noted, the Congress of 1925 may not have specifically intended the Act to be applicable in state courts, this is understandable in view of the *Swift* v. *Tyson* era in which the law was enacted. This absence of specific intent is not, however, of particular significance in determin-

5. The research department of the American Arbitration Association has compiled a partial list of 122 organizations which sponsored the Federal Arbitration Law. It must be seriously doubted that they would have had any interest in a law with such a minimal impact. A list of these organizations is included as an Appendix.

ing whether the Act should be held to apply in state courts today.[6]

What is dispositive is that Congress intended a national substantive law of arbitration to govern arbitration provisions in interstate commerce cases.

> "If it is an exercise of the commerce and admiralty powers, the Act must apply not only to litigation in the federal courts but to suits in state courts as well." *Metro Industrial Painting Corp.* v. *Terminal Construction Co.*, 287 F.2d 382, 386 (2d Cir. 1961).[7]

The best statement of the possible alternatives before the Court is well presented in Note, 69 Yale L. J. 847, 864 (1960).

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6. For instance, in *Pennsylvania* v. *Nelson*, 350 U. S. 497, 504 (1956), this Court held that "the conclusion is inescapable that Congress has intended to occupy the field of sedition" and that "a state sedition statute is superseded regardless of whether it purports to supplant the federal law," despite the written opinion of the Smith Act's author, Representative Howard Smith, that Congress never had "the faintest notion of nullifying the concurrent jurisdiction of the respective sovereign states to pursue also their own prosecutions for subversive activities." Quoted in Brief for Petitioner in *Pennsylvania* v. *Nelson* at p. 37.

7. The Sixth Circuit in *American Airlines Inc.* v. *Louisville & Jefferson County Air Board*, 269 F.2d 811 (1959), cited as a case in opposition (pet. brief, p. 13), makes the same point at p. 815.

> "Within the scope of the [United States Arbitration] statute circumscribed by the Constitution, Federal law is of course paramount under the Supremacy Clause, and State law must give way."

For other cases to the same effect, see *Robinson* v. *Bache & Co.*, 227 F.Supp. 456 (S.D. N.Y. 1964); *Younker Bros. Inc.* v. *Standard Constr. Co.*, 241 F.Supp. 17 (S.D. Ia. 1965); and *Coastal States Gas Producing Co.* v. *Producing Properties, Inc.*, 203 F.Supp. 956 (S.D. Tex. 1962).

"Had the 1925 Congress anticipated *Erie*, it seems likely [in light of the argument presented, *amicus* submits that it is conclusive] that it would have preferred making state courts enforce maritime and interstate or foreign commerce arbitration agreements to emasculating the federal act by excluding all diversity suits."

POINT II

Federal Arbitration Law requires arbitration of fraud in the inducement disputes under a broad clause, where the remedy sought is rescission.

A. Intent of the Parties

The first issue to be decided, as in any case where specific performance of an arbitration agreement is sought, is whether the arbitration clause is broad enough to include within it the particular dispute between the parties. For it is in the arbitration clause that the intention to arbitrate must be found. If the clause is too limited to include the dispute, this requisite intent will be lacking, and arbitration will accordingly be denied.

In the case at bar, the parties agreed to arbitrate "any controversy or claim arising out of or relating to this Agreement, or the breach thereof." This very clause (substituting "Contract" for "Agreement") has been, for more than twenty years, Kellor, *American Arbitration* (1948), p. 231, suggested by the American Arbitration Association to parties who wish to take the minimum risk that any dispute later be adjudicated outside the scope of arbitration. This clause, commonly referred to as the broad clause, is

the most all-embracing arbitration clause normally contained in any contract.

As such, its application to this fact situation has been judicially noted, in *dicta,* in *In re Kinoshita & Co.,* 287 F.2d 951, 953 (2d Cir. 1961).

> "Had the parties used the standard clause recommended by the American Arbitration Association and widely used, the arbitration agreement would clearly have been sufficiently broad to cover a dispute over fraudulent inducement."

This statement, based on an interpretation of the same arbitration clause with reference to the same dispute, stands in sharp contrast to the assertion that men would never consciously agree to arbitrate any fraud that would give rise to an action to set aside their agreement (pet. brief, p. 26).

The extent of the parties' agreement is contained in the arbitration clause. To what did they agree? They agreed to arbitrate any controversy or claim arising out of or relating to the agreement. The question is whether this dispute, fraud in the inducement, is a controversy or claim arising out of or relating to the agreement. No amount of rhetoric can further clarify or simplify the meaning of these terms. It is submitted that a reasonable construction of this all-embracing language must compel the conclusion reached in *Kinoshita,* that the instant dispute is encompassed within its scope.

It is submitted that the underlying misconception surrounding this notion of intent is well illustrated in the

statement that "to say that the parties contemplated fraud is specious" (pet. brief, p. 27).

It may well be true that the parties did not contemplate fraud, but only in the sense that they did not contemplate any other *particular* kind of dispute. Indeed, if they had contemplated specific types of disputes, and desired to limit arbitration to those disputes alone, they would not have used the broad clause. They would instead have used a clause narrowly directed to the issues they saw in prospect.[8]

This very distinction between the broad arbitration clause and a restrictive arbitration provision was emphasized within the last month by the Court of Appeals for the District of Columbia in *J. P. Greathouse Steel Erectors, Inc.* v. *Blount Brothers Constr. Co.* (No. 20082, Feb. 8, 1967). At issue was a restrictive clause limiting arbitration to "any question of fact." The court, in holding that the arbitrators exceeded their authority under the clause by arbitrating a claim for breach of contract, made special reference to the fact that the parties had not utilized the broad language suggested by the American Arbitration Association, thus evidencing an intent to limit the arbitrators' power.

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8. "The parties are generally allowed great leeway to frame an arbitration clause which answers their specific needs. In some instances they may find it advisable to use a restrictive clause eliminating the arbitrator's freedom to deal with any issues arising out of the contractual relationship that they do not wish submitted to him. * * * A restrictive clause may provide that the arbitrator can deal only with a specific provision of the contract. * * * They [the parties] may decide to limit arbitration to factual issues only." Domke, *Commercial Arbitration* (Prentice Hall, 1965), pp. 37-38.

The American Arbitration Association is frequently the administrator of arbitrations at the request of parties, run pursuant to arbitration clauses so tailored to include certain disputes and exclude others.[9] In the case at bar, the inclusion of this broad arbitration clause indicates that the parties not only had no contemplation as to the specific type of dispute that would arise, but also did not intend to restrict the use of arbitration to any given area, or exclude its operation in any given area.

The real contention in the case at bar would seem to be that despite the fact that a normal construction of the clause would establish the dispute to be encompassed by the arbitration provision, this provision should nonetheless be viewed as inapplicable to disputes which involve the making of the contract. The asserted reason is that parties would never agree to arbitrate that the agreement itself was fraudulently obtained.

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9. For example, the arbitration provision in the standard uninsured motorist endorsement which accounted for 64% of the 13,000 cases administered in 1966 by the AAA, contains such a narrow clause. "Arbitration. If any person making claim hereunder and the company do not agree that such person is legally entitled to recover damages from the owner or operator of an uninsured automobile because of bodily injury to the insured, or do not agree as to the amount of payment which may be owing under this endorsement, then, upon written demand of either, the matter or matters upon which such person and the company do not agree shall be settled by arbitration in accordance with the rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. Such person and the company each agree to consider itself bound and to be bound by any award made by the arbitrators pursuant to this endorsement."

Under this clause, only issues involving negligence and the amount of damages are left to arbitration. *Rosenbaum* v. *American Surety Co.*, 11 N. Y. 2d 310, 229 N. Y. S. 2d 375 (1962).

This contention misconstrues the fundamental purpose behind the inclusion of a broad arbitration clause.

As already indicated, when parties are of the opinion that certain types of disputes might be more advantageously resolved through arbitration, but not others, they so provide in a restricted clause. Or if they should agree that an arbitrator would be better suited to determine certain types of issues, such as issues of fact, but not of law, they may so provide, again in a restricted clause.

Underlying the broad clause, however, is the conscious judgment of the parties that resort to a court over any dispute, whatever its type, whatever the issues, is somehow to lose. The reasons for that judgment may be any of several. They may be based on sound pragmatic considerations or a misconception of the legal process. But parties are entitled to make that judgment. For instance, the parties may consider a speedy final decision of disputes of such paramount importance, that, correct or incorrect, it is preferable to one reached through the judicial process with its potentially lengthy and time-consuming appeal procedures. The parties may pre-judge legal fees to be too expensive, whatever the dispute, or universally prefer privacy and/or informality to a court trial. It may simply be that the parties share a mutual dislike for the court system, as many admittedly possess for arbitration. The reasons, so long as they are not themselves fraudulent should be irrelevant.[10] What is relevant is that the parties

10. Thus, there is no disagreement with the statement in *Moseley* v. *Electronic & Missile Facilities, Inc.*, 374 U. S. 167, 83 S. Ct. 1815, 10 L. Ed. 2d 818 (1963) (pet. brief, p. 20), that the question as to whether the arbitration provision *itself* was fraudulently induced is a judicial one.

intended to exclude the judiciary, for reasons which apply equally as well to "fraud in the inducement" disputes as to any others. For a speedy, final resolution of a "fraud in the inducement" dispute can be as much desired as a speedy and final resolution of a dispute over adequacy of performance. This being true, it is submitted that there is no basis to the contention that parties simply do not intend to arbitrate disputes involving fraud in the inducement.

B. Separability

Another issue bearing on this point is whether an arbitration agreement within a container contract is separable. Before this question can be answered, it is necessary to understand why it is relevant.

The argument has been urged, that unless the arbitration clause is treated as separable, a claim that the entire transaction was induced by fraud requires that the arbitration provision necessarily falls with the rest of the contract.

Thus, at least where the remedy applied for is rescission (an action for damages based on the fraud would have the effect of affirming the contract, *including* the arbitration clause) an initial judicial determination is required to determine whether the contract and all its provisions, including the arbitration provision, are valid.

Conversely, if the arbitration clause is viewed as separable, the objection would be avoided, since no taint would attach to the arbitrator's contractual power under the arbitration clause, unless that clause itself was alleged to be fraudulently induced.

It is submitted that the "non-separability" rule cannot be accepted in that it inherently disregards the single fundamental question at issue. Did the parties *intend* that the dispute of fraudulent inducement be arbitrated?

It has been suggested that the parties can easily avoid limiting interpretations of an arbitration clause "by the use of sufficiently explicit language" (pet. brief, p. 22). Paradoxically, however, under a non-separability rule, no clause, no matter how explicit (if a more explicit arbitration clause is possible) could ever be sufficiently explicit to permit arbitration of a fraud in the inducement dispute, if rescission were sought. This for the obvious reason that any such clause must inevitably expose the same defect, namely inclusion within the challenged agreement.

Realistically, what is at issue is whether the broad arbitration clause encompasses a claim of fraud in the inducement, or whether no future disputes clause will be construed as adequate for that purpose. A direct answer to this question is of vital importance to the thousands of commercial businessmen who commonly utilize the clause.

The separability rule, on the other hand, might properly be described as a rule of legal necessity, designed to give effect to the intentions of the parties.

Under this rule, before arbitration can be ordered, a determination must first be made as to whether the parties intended that fraud in the inducement be arbitrated. This is accomplished by an examination of the arbitration provi-

sion.[11] If the clause is not broad enough to evidence that intent, arbitration will not be so ordered, because there is no agreement to arbitrate the particular dispute. If the clause demonstrates the intent of the parties to arbitrate fraud in the inducement, a rule of separability is justified on the basis that the parties themselves must have intended the clause to be separable if they intended it to have effect at all.

Admittedly this cannot be considered any more than a constructive intent. The parties contemplated separability and non-separability as much as they contemplated fraud. The key question is whether they intended to arbitrate fraud in the inducement. A rule of law which first raises that question, and enforces arbitration where that intent is found, is far more reasonable and in conformity with the expectations of the parties than a rule which automatically denies enforcement to the arbitration agreement without any concern for the parties' intent.

There is no merit to the contention that arbitration will destroy a party's inherent right to elect its remedy, in this case rescission.[12]

Section 42 of the Commercial Arbitration Rules of the American Arbitration Association, under which the parties

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11. This analysis is in complete accord with the statement of Brennan, J. and Harlan, J., concurring in *United Steelworkers of America* v. *American Man. Co.*, 363 U. S. 564, 570 (pet. brief, p. 19). Whether the parties have agreed to arbitrate this particular dispute should be the conclusive issue in the case.

12. Further, to permit a party to defeat an arbitration clause merely by later framing his pleadings so as to seek a particular type of relief, in this case, rescission, would do violence to the parties' original contractual intent, which should control.

agreed to arbitrate, specifically provides that "the arbitrator may grant *any* remedy or relief which he deems just and equitable and within the scope of the agreement of the parties * * *." The commercial arbitrator possesses, under American Arbitration Association rules, equitable powers sufficient to grant rescission, if he should find that relief merited.[13]

The remedy which petitioner elects he may obtain at arbitration as well as in court. He loses no right to elect it, but is merely prevented from seeking it in a particular *forum*, in keeping with his agreement.

Conclusion

Amicus is not concerned with the outcome of this case so far as it affects the particular parties. It is seriously concerned with the effect that a decision on the two questions presented would have upon the free and sound progress of the system of commercial arbitration in this country.

It submits that a holding that the Federal Arbitration Act is procedural would herald the renaissance of the old common law hostility to arbitration, which the Act was passed to overcome. As to the meaning to be accorded the broad arbitration clause, *amicus* endorses the view articu-

13. The New York Court of Appeals has confirmed the power of the arbitrator, under AAA rules, to grant equitable relief. "The contract provided that any controversy arising out of it should be settled by arbitration in accordance with American Arbitration Association rules and the rules of that Association in so many words authorized an arbitrator to grant equitable relief." *Staklinski* v. *Pyramid Elec. Co.*, 6 N.Y. 2d 159, 163, 188 N.Y.S.2d 541, 542 (1959).

lated in *Lawrence* that it must be interpreted in light of the Act's liberal policy of promoting arbitration to accord with the original intention of the parties.

Respectfully submitted,

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